

OPINION NO. 2006-041**Syllabus:**

1. The positions of county commissioner and member of a county board of elections are incompatible. In a given situation, however, a county prosecuting attorney may determine, on the basis of the specific facts and circumstances, that a person may serve briefly in both positions when the person is not a candidate for an office to be filled at an election and will not be subject immediately to the budgetary conflicts of interest that exist between the two positions.

2. A county commissioner who serves as a member of a county board of elections may not participate in any deliberations, discussions, negotiations, or votes concerning the lease of office space to or by a board of elections, the provision of health or life insurance to the employees or members of the board of elections, or matters concerning the payment of the expenses of the board of elections.
3. A member of a county board of elections who serves as a county commissioner may not participate in any deliberations, discussions, negotiations, or votes concerning the lease of office space from the board of county commissioners or a matter pertaining to the conduct or outcome of an election on a county issue or question.
4. Whether a person's simultaneous service as a county commissioner and member of a county board of elections violates the provisions of R.C. Chapter 102 and R.C. 2921.42-.43 is a question reserved to the Ohio Ethics Commission.

To: Stephen K. Haller, Greene County Prosecuting Attorney, Xenia, Ohio
By: Jim Petro, Attorney General, September 21, 2006

You have requested an opinion whether the positions of county commissioner and member of the county board of elections are compatible. For the reasons that follow, it is our opinion that these two positions are incompatible. In a given situation, however, a county prosecuting attorney may determine, on the basis of the specific facts and circumstances, that a person may serve briefly in both positions when the person is not a candidate for an office to be filled at an election and will not be subject immediately to the budgetary conflicts of interest that exist between the two positions.

A county commissioner who serves as a member of a county board of elections may not participate in any deliberations, discussions, negotiations, or votes concerning the lease of office space to or by a board of elections, the provision of health or life insurance to the employees or members of the board of elections, or matters concerning the payment of the expenses of the board of elections.

A member of a county board of elections who serves as a county commissioner may not participate in any deliberations, discussions, negotiations, or votes concerning the lease of office space from the board of county commissioners or a matter pertaining to the conduct or outcome of an election on a county issue or question.

Whether a person's simultaneous service as a county commissioner and member of a county board of elections violates the provisions of R.C. Chapter 102 and R.C. 2921.42-.43 is a question reserved to the Ohio Ethics Commission.

Compatibility Test

The seven questions used to determine whether two public positions are compatible are as follows:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Does a constitutional provision or the empowering statutes of either position limit employment in another public position or the holding of another public office?
3. Is one position subordinate to, or in any way a check upon, the other?
4. Is it physically possible for one person to discharge the duties of both positions?
5. Is there an impermissible conflict of interest between the two positions?
6. Are there local charter provisions, resolutions, or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

See 2003 Op. Att’y Gen. No. 2003-041 at 2-335 and 2-336. *See generally* 2 Ohio Admin. Code 123:1-46-02(F) (“[s]ervice in an appointed or elected position is prohibited when such position is subordinate to or in any way a check upon a position concurrently occupied by a classified or unclassified employee, or when it is physically impossible for one person to discharge the duties of both positions, or if some specific constitutional or statutory bar exists prohibiting a person from serving [in] both positions”).

The sixth and seventh questions of the compatibility test pertain to the applicability of charter provisions, resolutions, or ordinances, and federal, state, and local regulations. No state or federal regulation prohibits a person from serving simultaneously in the positions of county commissioner and member of a county board of elections. Additionally, whether there is an applicable local charter provision, resolution, ordinance, or departmental regulation which prohibits a person from serving simultaneously in these two positions is a question for local officials to answer. For the purpose of this opinion, it is assumed that no such local charter provision, resolution, ordinance, or departmental regulation exists.

Discussion of R.C. 124.57

The first question of the compatibility test asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits officers and employees in the classified service of, *inter alia*, the state or a county from taking part in a variety of activities that occur as part of the regular political process and are partisan in nature.¹ As summarized in 2003 Op. Att’y Gen. No. 2003-041 at 2-336 (footnote omitted), “R.C. 124.57 does the following: it prohibits

¹ R.C. 124.57 states, in part:

No officer or employee in the classified service of the state, the several counties, cities, and city school districts of the state, or the civil

an officer or employee in the classified service from seeking election or appointment to, or holding, a partisan political office, or engaging in other partisan political activities, and it prevents a partisan political officeholder from serving simultaneously as an officer or employee in the classified service.” *Accord* 2001 Op. Att’y Gen. No. 2001-034 at 2-203; *see* rule 123:1-46-02(C).

Pursuant to R.C. 124.11(A), the positions of county commissioner and member of a board of elections are in the unclassified service. *See* R.C. 124.11(A)(1) (the unclassified service includes “[a]ll officers elected by popular vote or persons appointed to fill vacancies in those offices”); R.C. 124.11(A)(2) (the unclassified service includes “[a]ll election officers as defined in [R.C. 3501.01]”); *see also* R.C. 305.01 (providing for the election of county commissioners); R.C. 3501.01(U)(5) (the term election officer includes members of boards of elections). R.C. 124.57’s prohibition thus does not apply to a county commissioner or member of a board of elections. *See generally* rule 123:1-46-02(E) (“[e]mployees in the unclassified service, who serve at the pleasure of the appointing authority and are not subject to competitive examination, are not prohibited from engaging in political activity unless specifically precluded by federal or state constitutional or statutory provisions”).

Constitutional Provisions and Statutes Prohibiting the Holding of Another Public Position

Question two of the compatibility test asks whether a constitutional provision or the empowering statutes of either position limit employment in another public position or the holding of another public office. No constitutional provision or statute *per se* prohibits a person from serving simultaneously in the positions of county commissioner and member of a board of elections.

R.C. 3501.15 states, however, that, except as therein provided, a member of a board of elections may not be a candidate for any office to be filled at an election:

No person shall serve as a member, director, deputy director, or employee of the board of elections who is a candidate² for any office to be filled at an election, except the office of delegate or alternate to a conven-

service townships of the state shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political party or for any candidate for public office; ... nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts of the state, or the civil service townships of the state be an officer in any political organization or take part in politics other than to vote as the officer or employee pleases and to express freely political opinions. (Emphasis added.)

² For purposes of R.C. 3501.15, the term “candidate” is defined as follows:

“Candidate” means any qualified person certified in accordance with the provisions of the Revised Code for placement on the official bal-

tion, member of the board of directors of a county agricultural society, presidential elector, or a member of a party committee. (Footnote added.)

R.C. 3501.15 thus prohibits a county commissioner from serving as a member of a board of elections when the commissioner is a candidate for the office of county commissioner, *see* R.C. 305.01, or any other office to be filled at an election. 2004 Op. Att’y Gen. No. 2004-019 at 2-155 and 2-156; *see* 1936 Op. Att’y Gen. No. 5294, vol. I, p. 347 (syllabus, paragraph two) (a county “coroner who is a candidate for election, may not at the same time be a member of a county board of elections”). When a county commissioner is not a candidate for the office of county commissioner or any other office to be filled at an election, a county commissioner is not barred by R.C. 3501.15 from serving as a member of a board of elections. *See* 1936 Op. Att’y Gen. No. 5294, vol. I, p. 347 (syllabus, paragraph one) (a county “coroner who is not a candidate for election, may be a member of a county board of elections, if it is physically possible to perform the duties of both offices”). Accordingly, when a county commissioner is not a candidate for the office of county commissioner or any other office to be filled at an election, the second question of the compatibility test may be answered in the negative.³

Subordination and Control

Question three of the compatibility test asks whether one position is subordinate to, or in any way a check upon, the other. A county commissioner, as an elected or appointed officer of the county, *see* R.C. 302.09; R.C. 305.01; R.C. 305.02, serves at the pleasure of, and is responsible to, the county’s citizens. *See generally* R.C. 3.07-.10 (procedures by which the electors of a county may remove a person from county office). In contrast, a member of a county board of elections is appointed by the Secretary of State and serves as his representative in election matters, R.C. 3501.06; *see* R.C. 3501.05(A); R.C. 3501.07, unless suspended or removed by the Secretary of State, R.C. 3501.16. Because neither position is responsible for appointing or removing the other, the positions of county commissioner and member of a board of elections are not subordinate to each other. The positions also operate independently of each other, and neither is required to assign duties to, or supervise, the other. *See generally State ex rel. The Columbus Blank Book Mfg. Co. v. Ayres*, 142 Ohio St. 216, 51 N.E.2d 636 (1943) (syllabus, paragraph two) (“[m]embers of the boards of elections act under the direct control of and are answerable only to the Secretary of State in his capacity as the chief elec-

lot of a primary, general, or special election to be held in this state, or any qualified person who claims to be a write-in candidate, or who knowingly assents to being represented as a write-in candidate by another at either a primary, general, or special election to be held in this state.

R.C. 3501.01(H).

³ You have informed us that the person who serves as a county commissioner and member of the county board of elections is not a candidate for the office of county commissioner or any other office to be filled at an election. Hence, R.C. 3501.15 does not apply in your particular situation.

tion officer of the state’’). Accordingly, neither position is subordinate to, or in any way a check upon, the other.

Physical Ability to Hold and Serve in Both Positions

Question four of the compatibility test asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question that is best resolved by the interested local officials since they may more precisely determine the time constraints and demands imposed upon the person as a county commissioner and member of a board of elections. 2003 Op. Att’y Gen. No. 2003-041 at 2-339. *See generally State ex rel. Gretick v. Jeffrey*, 12 Ohio St. 3d 55, 465 N.E.2d 412 (1984) (a person may hold the positions of county commissioner and full-time principal at a high school where there is no proof that the person is physically unable to perform the duties of both positions).

Nevertheless, it should be noted that county commissioners, as elected or appointed county officers, and members of county boards of elections, as election officers, are required to perform duties imposed by statute and, where the nature of such duties requires a commissioner or member of a board of elections to be present at a particular time or place, or act in a particular manner, the commissioner or board member must be able to do so. *See, e.g.*, R.C. 305.06(A) (“[t]he board of county commissioners shall conduct at least fifty regular sessions each year, at an office provided for the board in the county seat or at another location as provided in [R.C. 305.06(B)]. Each of these sessions shall be conducted at a specific time fixed in advance”); R.C. 305.07(A) (“[s]pecial sessions of the board of county commissioners may be held as often as the commissioners deem it necessary”); R.C. 3501.09 (“[b]iennially, within five days after the appointments to the board of elections are made by the secretary of state, the members of the board shall meet and organize by selecting one of their number as chairperson, who shall preside at all meetings”); R.C. 3505.30 (on the day of an election a board of elections “shall remain in session from the time of the opening of the polls, continuously, until the results of the election are received from every precinct in the county and such results are communicated to the secretary of state”). Thus, in order to serve simultaneously in the positions of county commissioner and member of a board of elections, a person must be certain that she will be able to carry out the duties of both positions in a competent and timely manner. 2003 Op. Att’y Gen. No. 2003-041 at 2-339. This means that there may not be a direct conflict between the times when the person is needed to perform duties on behalf of the board of county commissioners and the board of elections. *Id.*

Conflicts of Interest

The fifth and final question asks whether there is a conflict of interest between the two positions. A person may not hold two public positions concurrently if the “responsibilities in one position are such as to influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective.” 1980 Op. Att’y Gen. No. 80-035 at 2-149.

We must now review the powers, duties, and responsibilities of a county

commissioner and member of a county board of elections so as to determine whether there are any conflicts of interest between these two positions. If our review discloses conflicts, we must then determine whether the conflicts may be avoided or eliminated entirely, thus allowing the person to hold both positions at the same time. The factors used in making this determination include, but are not limited to, the probability of the conflicts occurring, the ability of the person to remove herself from any conflicts that may occur, whether the person exercises decision-making authority in both positions, and whether the conflicts relate to the primary functions of each position, or to financial or budgetary matters. 2003 Op. Att'y Gen. No. 2003-041 at 2-340.

Let us first review the powers, duties, and responsibilities of county commissioners. County commissioners are responsible for managing and administering the affairs of the county. *See generally* R.C. Chapter 307 (setting forth the general powers and duties of a board of county commissioners). These responsibilities include, *inter alia*, procuring group health or life insurance for county employees, R.C. 305.171, compounding or releasing debts, judgments, fines, or ameracements due the county and for the use thereof, R.C. 305.26, providing offices for county officers, R.C. 307.01; R.C. 307.02, entering into contracts on behalf of the county, *see, e.g.*, R.C. 9.60; R.C. 307.15-.153; R.C. 307.671-.674, and providing fire protection, ambulance, emergency medical, and nonemergency patient transport services, *see, e.g.*, R.C. 9.60; R.C. 307.05; R.C. 307.052.

The county commissioners are also responsible for preparing the county's budget and handling other fiscal matters on behalf of the county. *See, e.g.*, R.C. 135.33 (awards the county's active moneys to eligible institutions); R.C. 135.341 (establishes county investment policy). A board of county commissioners is made the taxing authority of the county for purposes of R.C. Chapters 133 (uniform public securities law) and 5705 (tax levy law). *See* R.C. 133.01(NN)(1); R.C. 5705.01(C). In this capacity, county commissioners may issue securities for the purpose of providing funds with which to pay one or more final judgments rendered against the county, R.C. 133.14; issue securities for the purpose of paying all or any portion of the costs of any permanent improvement that the county is authorized to acquire, improve, or construct, R.C. 133.15; issue general obligation bonds, R.C. 133.18; prepare the county's annual tax budget, R.C. 5705.28; and levy taxes, *see, e.g.*, R.C. 133.25; R.C. 5705.03; R.C. 5705.07; R.C. 5705.19.

We will now turn to the duties and responsibilities of a member of a county board of elections. As stated previously, the members of boards of elections are the representatives of the Secretary of State in election matters. R.C. 3501.06; *see also* R.C. 3501.05(A); R.C. 3501.07. In this capacity, the members are required to participate in matters relating to the registration of voters, the conduct of elections, and the investigation of election irregularities. R.C. 3501.11. In particular, members of county boards of elections are responsible for establishing, defining, providing, rearranging, and combining election precincts; fixing and providing places for voter registration and holding primaries and elections; furnishing polling places with suitable stalls, voting machines and equipment, and other required supplies; and appointing a director, deputy director, employees, and registrars, judges, and other of-

ficers of elections. R.C. 3501.11; R.C. 3501.18; R.C. 3501.22; R.C. 3501.29; R.C. 3501.30; R.C. 3501.301. Members also investigate irregularities, nonperformance of duties, or violations of R.C. Title 35 by election officers and other persons; review, examine, and certify the sufficiency and validity of petitions and nomination papers; receive the returns of elections, canvass the returns, make abstracts thereof, and transmit such abstracts to the proper authorities; investigate and determine the residence qualifications of electors and candidates; and maintain voter registration records. R.C. 3501.11.

Our review of the powers, duties, and responsibilities of the positions of county commissioner and member of a board of elections discloses that there are potential conflicts of interest between the two positions.⁴ First, a conflict may exist insofar as a board of county commissioners and board of elections are required to participate in determining the necessary and proper expenses of the board of elections. R.C. 3501.17, which sets forth the provisions governing the manner by which the expenses of a board of elections are paid, provides, in part:

(A) The expenses of the board of elections shall be paid from the county treasury, *in pursuance of appropriations by the board of county commissioners*, in the same manner as other county expenses are paid. If the board of county commissioners fails to appropriate an amount sufficient to provide for the necessary and proper expenses of the board of elections pertaining to the conduct of elections, *the board of elections may apply to the court of common pleas within the county, which shall fix the amount necessary to be appropriated and the amount shall be appropriated....*

.... If the board of elections requests a transfer of funds from one of its appropriation items to another, *the board of county commissioners shall adopt a resolution providing for the transfer* except as otherwise provided in [R.C. 5705.40].⁵ *The expenses of the board of elections shall*

⁴ A person who serves simultaneously as a county commissioner and member of a county board of elections may represent both the board of county commissioners and the board of elections on the county automatic data processing board. *See generally* R.C. 307.84 (“[t]he board of county commissioners of any county may, by resolution, establish a county automatic data processing board. The board shall consist of ... a member or representative of the board of county commissioners chosen by the board, two members or representatives of the board of elections chosen by the board of elections one of whom shall be a member of the political party receiving the greatest number of votes at the most recent general election for the office of governor and one of whom shall be a member of the political party receiving the second greatest number of votes at such an election, if the board of elections desires to participate”). For the purpose of this opinion, it is assumed that the person does not represent the board of county commissioners or the county board of elections on the county automatic data processing board.

⁵ R.C. 5705.40 states:

be apportioned among the county and the various subdivisions as provided in this section, and the amount chargeable to each subdivision shall be withheld by the auditor from the moneys payable thereto at the time of the next tax settlement. At the time of submitting budget estimates in each year, the board of elections shall submit to the taxing authority of each subdivision, upon the request of the subdivision, an estimate of the amount to be withheld from the subdivision during the next fiscal year.

(B) Except as otherwise provided in division (F) of this section,⁶ the entire compensation of the members of the board of elections and of the director, deputy director, and other employees in the board's offices; the expenditures for the rental, furnishing, and equipping of the office of the board and for the necessary office supplies for the use of the board; the expenditures for the acquisition, repair, care, and custody of the polling places, booths, guardrails, and other equipment for polling places; the cost of pollbooks, tally sheets, maps, flags, ballot boxes, and all other permanent records and equipment; the cost of all elections held in and for the state and county; and all other expenses of the board which are not chargeable to a political subdivision in accordance with this section *shall be paid in the same manner as other county expenses are paid.*

....

(D) The entire cost of special elections held on a day other than the day of a primary or general election, both in odd-numbered or in even-numbered years, *shall be charged to the subdivision...*

....

Any appropriation ordinance or measure may be amended or supplemented, provided that such amendment or supplement shall comply with all provisions of law governing the taxing authority in making an original appropriation and that no appropriation for any purpose shall be reduced below an amount sufficient to cover all unliquidated and outstanding contracts or obligations certified from or against the appropriation. Transfers may be made by resolution or ordinance from one appropriation item to another, except that a board of county commissioners shall, at the request of the county board of elections, adopt a resolution to transfer funds from one appropriation item of the board of elections to another appropriation item of the board of elections unless the board of county commissioners determines that the transfer is sought for the purpose of providing employee bonuses or salary increases other than increases necessary to reimburse employees for overtime worked.

⁶ R.C. 3501.17(F) reads as follows: “[w]hen a precinct is open during a general, primary, or special election solely for the purpose of submitting to the voters a statewide ballot issue, the state shall bear the entire cost of the election in that precinct and shall reimburse the county for all expenses incurred in opening the precinct.”

(H) The cost of renting, heating, and lighting registration places; the cost of the necessary books, forms, and supplies for the conduct of registration; and the cost of printing and posting precinct registration lists *shall be charged to the subdivision in which such registration is held.*

(Footnotes and emphasis added.)

See also R.C. 3501.11(O) (the board of elections shall “[p]repare and submit to the proper appropriating officer a budget estimating the cost of elections for the ensuing fiscal year”).

Under R.C. 3501.17, county commissioners may participate in deliberations, discussions, and votes concerning the payment of the expenses of the county board of elections. *See generally* 1978 Op. Att’y Gen. No. 78-064 (syllabus) (“[p]ursuant to R.C. 3501.17, a board of county commissioners is authorized to procure insurance to protect members of the board of elections from liability arising from the exercise of their official duties. However, the determination of whether such insurance is a ‘necessary and proper’ expense of the board of elections is within the sound discretion of the board of county commissioners”). In addition, under R.C. 3501.17, members of a board of elections may participate in deliberations, discussions, or votes concerning the bringing of legal action against the board of county commissioners for additional appropriations. *See generally* 1965 Op. Att’y Gen. No. 65-112 at 2-243 (“[i]f the board of county commissioners fails to appropriate [funds for a special election] then it devolves upon the board of elections to apply to the court of common pleas within the county to have fixed the amount necessary to be appropriated, which amount shall be appropriated”). *See generally also* R.C. 305.12 (“[t]he board of county commissioners may sue and be sued, and plead and be impleaded, in any court”).

When a county commissioner who serves as a member of the county board of elections deliberates, discusses, or votes in matters concerning the payment of the expenses of the county board of elections, it may be difficult for the commissioner to exercise her discretion to allocate county moneys in an objective and disinterested manner because of her position as a member of the county board of elections. *See State ex rel. Baden v. Gibbons*, 17 Ohio Law Abs. 341, 344, 1934 Ohio Misc. LEXIS 1224 (Ct. App. Butler County 1934) (a conflict of interest results when the duties of one position may be administered in such a way as to result in favoritism and preference being accorded to the other position); 1958 Op. Att’y Gen. No. 1962, p. 215, at 217-18 (in the preparation of the annual tax budget it may well occur that any proposed modifications or reductions with respect to one subdivision’s budget could be detrimental to another subdivision’s budget). Similarly, if this person, as a member of the board of elections, were required to deliberate, discuss, or vote on whether to bring a legal action against the board of county commissioners for an additional appropriation, it might be difficult for her in such a situation to exercise her discretion in a completely unbiased manner because of her position on the board of county commissioners. 2006 Op. Att’y Gen. No. 2006-003 at 2-33 (“a person who serves at the same time as a township trustee and member of the board of directors of a port authority may be required to participate in deliberations, discussions, negotiations, or votes concerning legal matters between the township and port authority, and, as such, may be subject to divided loyalties”).

A second conflict of interest between the two positions may exist because a county board of elections may lease office space from the board of county commissioners or another public or private entity.⁷ R.C. 3501.10(A) authorizes a board of elections to enter into a lease of office space:

The board of elections shall, as an expense of the board, provide suitable rooms for its offices and records and the necessary and proper furniture and supplies for those rooms. *The board may lease such offices and rooms, necessary to its operation, for the length of time and upon the terms the board deems in the best interest of the public, provided that the term of any such lease shall not exceed fifteen years.*

Thirty days prior to entering into such a lease, the board shall notify the board of county commissioners in writing of its intent to enter into the lease. The notice shall specify the terms and conditions of the lease. *Prior to the thirtieth day after receiving that notice and before any lease is entered into, the board of county commissioners may reject the proposed lease by a majority vote.* After receiving written notification of the rejection by the board of county commissioners, the board of elections shall not enter into the lease that was rejected, but may immediately enter into additional lease negotiations, subject to the requirements of this section. (Emphasis added.)

See generally 1961 Op. Att’y Gen. No. 1992, p. 23 (syllabus) (“[a] board of elections may enter into a lease for a building to be used for the storage of voting machines, authority for such being reasonably implied from the provisions of division (C) of [R.C. 3501.11], and from the provisions of [R.C. 3501.17, R.C. 3507.03, and R.C. 3507.12]”).

A county commissioner who serves as a member of a county board of elections may thus be required to deliberate, discuss, negotiate, or vote on both sides of the board of election’s lease of office space from the board of county commissioners. By participating on both sides of the lease, such person will be exposed to conflicting loyalties and to the potential temptation of acting in a manner not in the best interest of the public. *See* 2006 Op. Att’y Gen. No. 2006-003 at 2-29; 1994 Op. Att’y Gen. No. 94-013 at 2-61; 1981 Op. Att’y Gen. No. 81-027 at 2-101. Moreover, if a county commissioner who also is a member of a board of elections were required to deliberate, discuss, or vote on the propriety of a lease of office space between the board of elections and an entity other than the board of county commissioners, it might be difficult for the commissioner to perform her duties and exercise her discretion in a completely objective and disinterested manner because of her position with the board of elections. *See* 2003 Op. Att’y Gen. No. 2003-006 at 2-37.

An additional conflict of interest may arise because a board of county commissioners may be required to determine whether to provide health or life insurance

⁷ A board of county commissioners manages and controls the county’s buildings and other structures. *See, e.g.*, R.C. 307.01; R.C. 307.02; R.C. 307.03; R.C. 307.09; *see also* R.C. 305.16.

to the employees or members of the board of elections. With respect to the provision of health and life insurance, R.C. 3501.141 states:

(A) The board of elections of any county may contract, purchase, or otherwise procure and pay all or any part of the cost of group insurance policies that may provide benefits for hospitalization, surgical care, major medical care, disability, dental care, eye care, medical care, hearing aids, or prescription drugs, and that may provide sickness and accident insurance, or group life insurance, or a combination of any of the foregoing types of insurance or coverage for the full-time employees of such board and their immediate dependents, whether issued by an insurance company or a health insuring corporation, duly authorized to do business in this state. *The authority granted under this division applies only when the board of county commissioners, by resolution, denies coverage described in this division to full-time employees of the board of elections.*

(B) The board of elections of any county, *with the approval of the board of county commissioners*, may procure and pay all or any part of the cost of group hospitalization, surgical, major medical, or sickness and accident insurance or a combination of any of the foregoing types of insurance or coverage for the members appointed to the board of elections under [R.C. 3501.06] and their immediate dependents when each member's term begins, whether issued by an insurance company or a health insuring corporation, duly authorized to do business in this state. (Emphasis added.)

Thus, if a person who serves as a county commissioner and member of the board of elections were required, as a county commissioner, to deliberate, discuss or vote on matters relating to the provision of health or life insurance to the employees or members of the board of elections, it might be difficult for the person to make fair and impartial decisions that are in the best interest of the public. *See* R.C. 2004 Op. Att'y Gen. No. 2004-051 at 2-444 and 2-445.

A final conflict of interest may arise because the board of elections performs duties that could affect the conduct or outcome of an election on a county issue or question.⁸ For example, a board of elections is required to “[r]eview, examine, and certify the sufficiency and validity of petitions[,]” R.C. 3501.11(K), and “[g]ive approval to ballot language for any local question or issue[,]” R.C. 3501.11(V). *See*

⁸ Prior opinions of the Attorneys General have concluded that the position of member of a county board of elections is not incompatible with another public position merely because the board of elections performs duties that could affect the conduct or outcome of an election on an issue or question presented to electors by the board member's other employer. *See, e.g.,* 1990 Op. Att'y Gen. No. 90-084; 1974 Op. Att'y Gen. No. 74-006; 1952 Op. Att'y Gen. No. 1730, p. 594. None of these opinions, however, addressed the specific conflict of interest that arises in such a situation.

generally R.C. 3501.02(F) (“[a]ny question or issue, except a candidacy, to be voted upon at an election shall be certified, for placement upon the ballot, to the board of elections not later than four p.m. of the seventy-fifth day before the day of the election”); R.C. 3501.38 (petition requirements). There are also various instances in which a board of county commissioners or the citizens of a county may seek to place a county issue or question on an election ballot. *See, e.g.*, R.C. 303.12 (petition for zoning referendum); R.C. 305.31 (petition requesting that a county tax resolution be approved or rejected by county voters); R.C. 305.32 (referendum petitions); R.C. 3501.10(A) (issuance of bonds for the acquisition of real estate and the construction on it of a suitable building with necessary furniture and equipment for the proper administration of the duties of the board of elections); R.C. 5705.19 (placement of tax levies on an election ballot by a board of county commissioners); R.C. 5705.22 (additional levy for a county hospital); R.C. 5705.221 (additional levy for the county’s alcohol, drug addition, and mental health programs). *See generally* R.C. 133.18 (submission of question of issuance of general obligation bonds); R.C. 5705.25 (submission of proposed tax levy). In addition, a county board of elections is responsible for canvassing the returns of elections and declaring the results, R.C. 3501.11; R.C. 3505.32; R.C. 3505.33, and recounting, when required, the votes cast in an election, R.C. 3515.04.

Decisions made by a county board of elections when performing these duties have the potential of affecting the conduct or outcome of an election on a county issue or question. *See* 2004 Op. Att’y Gen. No. 2004-019 at 2-163. A county commissioner has an obligation to obtain in such an election a result that is favorable to the county. *See generally State ex rel. Bd. of Cty. Comm’rs of Marion Cty. v. Allen*, 86 Ohio St. 244, 250, 99 N.E. 312 (1912) (“[t]he board of county commissioners is the body the *quasi* corporation-in whom is vested by law the title to all the property of the county. In one sense they are the agents of the county, and in another sense they are the county itself” (quoting *Carder v. Comm’rs of Fayette Cty.*, 16 Ohio St. 353, 369 (1865))). Thus, if a county board of elections is required to participate in any deliberations, discussions, or votes concerning a matter pertaining to the conduct or outcome of an election on a county issue or question, a member of the board of elections who is a county commissioner could be prevented from making completely objective decisions because of her responsibility to advance the interests and welfare of the county and its citizens. *See id.*

Immediacy of the Conflicts of Interest

Let us now consider the immediacy of the conflicts of interest between the positions of county commissioner and member of a county board of elections. We will first discuss the immediacy of the conflicts of interest that arise because a board of county commissioners is required to appropriate an amount of money sufficient to pay the necessary and proper expenses of the board of elections. Next, we will address the immediacy of the remaining conflicts of interest.

Immediacy of the Budgetary Conflicts of Interest

The budgetary conflicts of interest that exist between the positions of county commissioner and member of a county board of elections can not be eliminated

entirely. A board of county commissioners is required annually to make an appropriation of money to fund the operations of a county board of elections, and a board of elections may file at any time a legal action against the board of county commissioners for additional appropriations.

Further, the conflicts involve the exercise of decision-making authority by the board of county commissioners and board of elections in financial and budgetary matters. Also, the preparation of a financial budget is a primary function of the board of county commissioners and board of elections.

Finally, because the conflicts involve financial and budgetary matters, which are a primary function of both boards, it is our belief that it is impractical for a county commissioner or member of a board of elections to continually abstain from such matters. Therefore, the conflicts of interest that arise because a board of county commissioners is required to appropriate an amount of money sufficient to pay the necessary and proper expenses of the board of elections prohibit a person from serving simultaneously as a county commissioner and member of a board of elections. *See generally* 1985 Op. Att’y Gen. No. 85-029 at 2-107 (“[i]t is well established that where one public position has the power to appropriate funds to a second position, one person may not serve in both positions”); 1975 Op. Att’y Gen. No. 75-032 (the positions of county commissioner and member of a county board of mental retardation are incompatible because the county commissioners are required to levy taxes and make appropriations sufficient to enable the county board of mental retardation to perform its functions and duties).

You explain in your letter, however, that there may be instances in which a county prosecuting attorney may be able to determine that a person will not be subject immediately to the budgetary conflicts of interest that exist between the positions of county commissioner and member of the county board of elections. A person who is a county commissioner until January 2, 2007, *see* R.C. 305.01, was appointed to the county board of elections. The appointment took place after the board of county commissioners approved the budget of the board of elections and appropriated sufficient funds to the board of elections. In addition, the person is not a candidate for the office of county commissioner in November’s general election. *See* note three, *supra*.

You assert, therefore, that this officeholder will hold both positions for a brief period of time, and will not be reelected as a county commissioner. Moreover, during that time, neither the board of county commissioners nor the board of elections will have to consider the matter of appropriating additional money to the board of elections while the person is a county commissioner. This means that the person will not be subject immediately to the budgetary conflicts of interest that exist between the positions of county commissioner and member of a board of elections. *See generally State ex rel. Ruggles v. Howser*, Case No. CA87-11-017, 1988 Ohio App. LEXIS 1678, at *7-8 (Brown County May 2, 1988) (“it was the Ohio General Assembly’s intention that county boards of election be given independent authority over their own accounts and budget following the completion of the appropriation process [set out in R.C. 3501.17]. By this we mean that once the

board of county commissioners has appropriated what has finally been determined to be the board of elections' necessary and proper expenses, the actual expenditure of those monies lies exclusively within the domain of the board of elections and is not subject to any form of oversight by the board of county commissioners''; 1984 Op. Att'y Gen. No. 84-091 at 2-313 (''once the board of county commissioners has appropriated a sufficient amount to meet the necessary expenses of the board of elections, the commissioners have no further control over the expenditures of the board of elections. Further, a board of county commissioners has no authority to change arbitrarily the amounts requested by the board of elections for its necessary and proper expenses'' (citations omitted)); 1932 Op. Att'y Gen. No. 4023, vol. I, p. 154 (syllabus) (''[c]ounty commissioners do not have authority to arbitrarily change the amounts requested and submitted in the budget of the board of elections for the necessary and proper expenses of the board, and substitute their own arbitrary figures in lieu of the amounts requested''). *See generally also* R.C. 3501.17(A) (''[i]f the board of elections requests a transfer of funds from one of its appropriation items to another, the board of county commissioners shall adopt a resolution providing for the transfer except as provided in [R.C. 5705.40]'').

Because the person will not be exposed immediately to the budgetary conflicts of interest that exist between the positions of county commissioner and member of a county board of elections, you believe that the person should be permitted to serve out the remainder of her term as county commissioner, while serving as a member of the board of elections. Moreover, if a matter concerning the expenses of the board of elections should arise, *see* R.C. 3501.17,⁹ the person, as a county commissioner, may abstain from participating in any deliberations, discussions, or votes concerning the matter. *See generally* 2003 Op. Att'y Gen. No. 2003-006 at 2-37 and 2-38 (''a county commissioner, as a public officer, has a duty to abstain from participating in any matter that would impair his objectivity'').

We believe that, in ordinary circumstances, the positions of county commissioner and member of a county board of elections are incompatible. In this instance, however, we are willing to permit a limited exception to this general rule based upon the specific circumstances of this officeholder, as you have described them. Accordingly, a person may not serve simultaneously as a county commissioner and member of a county board of elections unless the county prosecuting attorney determines that the person is not a candidate for an office to be filled at an election and will not be subject immediately to the budgetary conflicts of interest that exist between the two positions. If a county prosecuting attorney makes such a determination, a person may serve briefly in both positions, provided the person, as a county commissioner, does not participate in any deliberations, discussions, or votes concerning the payment of the expenses of the board of elections.

Immediacy of the Remaining Conflicts of Interest

We will now address the immediacy of the other conflicts of interest. It is

⁹ *See generally* 1965 Op. Att'y Gen. No. 65-112 (syllabus, paragraph two) (''[w]here current appropriations of the board of County Commissioners do not anticipate the expenses of a special election, provision must be made therefor through the procedures established by [R.C. 3501.17]'').

unlikely that matters concerning the lease of office space to or by a board of elections or the provision of health or life insurance to the employees or members of the board of elections will occur frequently. It is also speculative whether a board of elections will be required to consider leasing office space from the board of county commissioners or a matter that will affect the conduct or outcome of an election on a county issue or question. Hence, deliberations, discussions, negotiations, or votes on such matters should be infrequent when a person holds both positions for a brief period of time.

Moreover, when such matters do come before the board of county commissioners or county board of elections, a person who serves as a county commissioner and member of the board of elections is able to remove herself from any deliberations, discussions, negotiations, or votes on such matters because both the board of county commissioners and the board of elections are capable of functioning and performing their statutory duties when one of their members abstains from participating in a matter. *See* 2004 Op. Att’y Gen. No. 2004-025 at 2-228; *see also* R.C. 305.08 (“[a] majority of the board [of county commissioners] shall constitute a quorum at any regular or special meeting”); R.C. 3501.11 (“[e]ach board of elections shall exercise by a majority vote all powers granted to the board by [R.C. Title 35], shall perform all the duties imposed by law, and shall do all of the following [listed herein]”). *See generally* *State ex rel. Gretick v. Jeffrey*, 12 Ohio St. 3d at 56, 465 N.E.2d 412 (a county commissioner who is a principal at a high school may refrain from voting on a matter involving school property assessments and avoid a conflict of interest); *State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d 47, 48, 212 N.E.2d 604 (1965) (“[i]n the absence of a statute to the contrary, any action by a board requires that a quorum participate therein, and that a majority of the quorum concur”). It is also well established that, in a matter in which a public officer is exposed to influences that may prevent him from making completely objective and disinterested decisions, the officer should refrain from participating in the matter. 2004 Op. Att’y Gen. No. 2004-025 at 2-228; 1994 Op. Att’y Gen. No. 94-079 at 2-394.

In light of the foregoing, it follows that a person who serves as a county commissioner and member of a county board of elections should, as county commissioner, abstain from participating in deliberations, discussions, negotiations, and votes concerning the lease of office space to or by the board of elections and the provision of health or life insurance to the employees or members of the board of elections. In addition, as a member of the board of elections, the person should abstain from participating in deliberations, discussions, negotiations, and votes concerning the lease of office space from the board of county commissioners and matters pertaining to the conduct or outcome of an election on a county issue or question. Therefore, we believe that these conflicts of interest are insufficient to render the positions of county commissioner and member of the county board of elections incompatible when the person holds both positions for a brief period of time and does not participate in deliberations, discussions, negotiations, or votes on any of the aforementioned matters. *See generally* *State ex rel. Gretick v. Jeffrey*, 12 Ohio St. 3d at 56, 465 N.E.2d 412 (“[p]ossibility of conflict of interest is insuf-

ficient to oust a duly elected public official from office’); *State ex rel. Corrigan v. Hensel*, 2 Ohio St. 2d 96, 99, 206 N.E.2d 563 (1965) (“[t]he law does not punish an officeholder for what he ‘could do’ or where there was a ‘possibility’ or opportunity to commit some wrongful act”).

Ethical Considerations

As a final matter, R.C. 2921.42(A)(4) states, in relevant part, that, “[n]o public official shall knowingly ... [h]ave an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.” *See also, e.g.,* R.C. 305.27 (“[n]o county commissioner shall be concerned, directly or indirectly, in any contract for work to be done or material to be furnished for the county”).¹⁰ County commissioners and members of boards of elections are subject to this prohibition. *See* R.C. 2921.01(A) (as used in R.C. 2921.42, the term “[p]ublic official” means “any elected or appointed officer, or employee, or agent of the state or any political subdivision”). For purposes of R.C. 2921.42, the term “[p]ublic contract” includes “the employment of an individual by the state, [or] any of its political subdivisions.” R.C. 2921.42(G)(1)(a).

R.C. 2921.42(A)(4) thus may prohibit a person from serving simultaneously as a county commissioner and member of a county board of elections. *See generally* Ohio Ethics Comm’n, Advisory Op. No. 99-002, slip op. at 3 (“[t]he Ethics Commission has held that R.C. 2921.42(A)(4) prohibits an elected officer of a political subdivision from simultaneously holding compensated employment with his own political subdivision because an employment relationship between a political subdivision and a public employee is a ‘public contract’ for purposes of R.C.

¹⁰ Whether a contract for work to be done or material to be furnished for the county exists between the board of county commissioners and county board of elections or whether, if such a contract does exist, a county commissioner has a prohibited interest in the contract for purposes of R.C. 305.27 are questions of fact that must be determined on a case-by-case basis at the local level. *See generally* Ohio Ethics Comm’n, Advisory Op. No. 91-001, slip op. at 4 (a township trustee who serves as a full-time paid employee of a fire company that contracts with the township does not have an interest in that contract unless (1) he has an ownership or fiduciary interest in the company, (2) he takes part in contract negotiations on behalf of the company, (3) his salary is based on the proceeds of the contract, (4) he receives a share of the contract’s proceeds in the form of a commission or fee, (5) his responsibilities as an employee include participation in the administration or execution of the contract or he serves in a management position with the responsibility to oversee execution or administration of the contract, (6) the establishment or operation of his employing agency is dependent upon receipt of the contract, or (7) his tenure is dependent upon his employer receiving the award of the contract). A county commissioner who violates R.C. 305.27 is required to “forfeit not less than [200] nor more than [2,000] dollars, to be recovered by a civil action, in the name of the state, for use of the county” and “forfeit, in like manner, any compensation he may have received on such contract.” R.C. 305.27.

2921.42”); Ohio Ethics Comm’n, Advisory Op. No. 91-002 (a city council member is prohibited from holding compensated employment with the city’s fire department). *See generally also* Ohio Ethics Comm’n, Advisory Op. No. 92-012, slip op. at 2 (“[t]he Ethics Commission has consistently held that an employment relationship between a political subdivision and an employee is a ‘public contract’ for purposes of R.C. 2921.42 since the political subdivision is purchasing or acquiring the services of the employee”). A person who violates R.C. 2921.42(A)(4) is guilty of having an unlawful interest in a public contract, a misdemeanor of the first degree. R.C. 2921.42(E).

Because the Ohio Ethics Commission is authorized under R.C. 102.08 to issue advisory opinions regarding the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43, it is appropriate that the Attorney General refrain from interpreting and applying these provisions by way of a formal opinion. 1994 Op. Att’y Gen. No. 94-079 at 2-397; 1987 Op. Att’y Gen. No. 87-033 (syllabus, paragraph three). *See generally* 1987 Op. Att’y Gen. No. 87-025 at 2-179 (“[t]his policy respects the jurisdiction of the Ethics Commission and prevents the possibility that the Attorney General and the Ethics Commission would render conflicting opinions on the same question”). It is, therefore, recommended that you consult with the Ohio Ethics Commission for advice whether a person’s simultaneous service as a county commissioner and member of a county board of elections violates the ethics provisions set forth in R.C. Chapter 102 and R.C. 2921.42-.43.

Conclusions

In summary, it is my opinion, and you are hereby advised as follows:

1. The positions of county commissioner and member of a county board of elections are incompatible. In a given situation, however, a county prosecuting attorney may determine, on the basis of the specific facts and circumstances, that a person may serve briefly in both positions when the person is not a candidate for an office to be filled at an election and will not be subject immediately to the budgetary conflicts of interest that exist between the two positions.
2. A county commissioner who serves as a member of a county board of elections may not participate in any deliberations, discussions, negotiations, or votes concerning the lease of office space to or by a board of elections, the provision of health or life insurance to the employees or members of the board of elections, or matters concerning the payment of the expenses of the board of elections.
3. A member of a county board of elections who serves as a county commissioner may not participate in any deliberations, discussions, negotiations, or votes concerning the lease of office space from the board of county commissioners or a matter pertaining to the conduct or outcome of an election on a county issue or question.
4. Whether a person’s simultaneous service as a county commissioner and member of a county board of elections violates the provisions

of R.C. Chapter 102 and R.C. 2921.42-.43 is a question reserved to the Ohio Ethics Commission.